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ceeded to dispense with precedent and adopt the American Law Institute test. On closer examination, it appears that the true reason for adopting a new test, when the facts did not warrant such action, was to inaugurate the American Law Institute's formulation in a situation where its M'Naghten-irresistible impulse character[56] could be easily disguised. Only under these innocuous facts was the court able to avoid the embarrassment of defining "substantial capacity" and of revealing its true progressive nature.

MICHELLE HOLTZMAN

JOINDER OF THE LIABILITY INSURER AS A PARTY DEFENDANT

Suit was brought against the insured and her insurer for damages sustained by the plaintiff from alleged negligent operation of the insured automobile. A final order was entered striking all portions of the complaint joining the insurer as a party defendant, and dismissing the insurer as a party to the cause. On appeal by the plaintiff, the District Court of Appeal, First District *held*, reversed and remanded: Subsection (a) of Rule 1.210, Florida Rules of Civil Procedure permits joinder of an insurer under a liability insurance policy as a party defendant. The complaint alleged facts which, if true, made the insurer a proper party defendant; therefore, it was error to grant the motion to strike and to dismiss the insurer as a party defendant. *Bussey v. Shingleton*, 211 So.2d 593 (Fla. 1st Dist. 1968), *petition for certiorari filed.*

At common law, joinder in one action of counts based on contract and on tort was prohibited.[1] Although some modern statutes have manifested a trend toward speeding up eventual recovery against an insurer by permitting the insurer to be joined in the original action, such joinder of a cause of action in tort against the owner or driver of a vehicle with a cause of action in contract against the insurer or indemnitor of the owner on the insurance policy or indemnity bond is still not allowed in the majority of jurisdictions.[2] However, several jurisdictions have statutes

it is only contended that she is not responsible under a misconstruction of *Durham*, which . . . has been expressly rejected by the District of Columbia Circuit . . . ." *Id.* at 929.

Perhaps recognizing the incongruity of this decision, the Fifth Circuit was more circumspect in its adoption of the American Law Institute test. In Blake v. United States, No. 23,945 (5th Cir., Feb. 12, 1969), the court's conclusion that the case was an appropriate one for adopting the American Law Institute test, was predicated on its finding that the evidence was such that the defendant could not successfully assert the insanity defense under a M'Naghten-irresistible impulse charge, but that he might succeed under a substantial lack of capacity type charge.

56. *See* notes 46, 48 *supra.*

1. 1 AM. JUR. *Actions* § 75 (1936).

2. Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Universal Auto. Ins. Co. v. Denton, 185 Ark. 899, 50 S.W.2d 592 (1932); Armijo v. Ward Transp., Inc., 134 Colo.

which either specifically permit joinder, or which have been so construed when the wording was open to such construction.[3] The courts which have considered this question have predicated their decisions permitting or denying joinder on one or more of the following reasons: the old standby common law rule prohibiting joinder of causes of action in tort with causes of action in contract,[4] or the abrogation of this doctrine in a given jurisdiction;[5] the distinction made between a liability and an indemnity policy;[6] whether the insurance policy contained a "no action" clause, and the validity given such a clause in a particular jurisdiction;[7] the court's interpretation of the legislative intent behind the statute.[8] The Louisiana and Wisconsin statutes are the most liberal,[9] expressly permitting the

275, 302 P.2d 517 (1956), Crowley v. Hardman Bros., 122 Colo. 489, 223 P.2d 1045 (1950); Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936); Stearns v. Graves, 61 Idaho 232, 99 P.2d 955 (1940); Aplin v. Smith, 197 Iowa 388, 197 N.W. 316 (1924); Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589 (Ky. 1952); Lieberthal v. Glens Falls Indem. Co., 316 Mich. 37, 24 N.W.2d 547 (1946); Conley v. United States Fidelity & Guar. Co., 98 Mont. 31, 37 P.2d 565 (1934); Bradford v. Kelly, 260 N.C. 382, 132 S.E.2d 886 (1963), Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955); Canen v. Kraft, 41 Ohio App. 120, 180 N.E. 277 (1931); Benevides v. Kelly, 90 R.I. 310, 157 A.2d 821 (1960); Zeigler v. Ryan, 63 S.D. 607, 262 N.W. 200 (1935); Bluth v. Neeson, 127 Tex. 462, 94 S.W.2d 407 (1936); Keseleff v. Sunset Hwy. Motor Freight Co., 187 Wash. 642, 60 P.2d 720 (1936); Campbell v. Campbell, 145 W. Va. 245, 114 S.E.2d 406 (1960), O'Neal v. Pocahontas Transp. Co., 99 W. Va. 456, 129 S.E. 478 (1925).

3. Deeg v. Lumbermen's Mut. Cas. Co., 279 F.2d 491 (10th Cir. 1960); Greear v. John Long Trucking, Inc., 272 F. Supp. 224 (W.D. Okla. 1967); Am. So. Ins. Co. v. Dime Taxi Serv., Inc., 275 Ala. 51, 151 So.2d 783 (1963); McWhorter Transfer Co. v. Peek, 232 Ala. 143, 167 So. 291 (1936); Butler v. Sequeira, 100 Cal. App. 2d 143, 223 P.2d 48 (1950); Harper Motor Lines, Inc., 218 Ga. 812, 130 S.E.2d 817 (1963); Sterling v. Hartenstein, 185 Kan. 50, 341 P.2d 90 (1959); Stephenson v. List Laundry & Dry Cleaners, Inc., 182 La. 383, 162 So. 19 (1935); Breedon v. Wilson, 58 N.M. 517, 273 P.2d 376 (1954); Lopez v. Townsend, 37 N.M. 574, 25 P.2d 809 (1933); James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950); Graves v. Harrington, 177 Okla. 448, 60 P.2d 622 (1936); Andrews v. Poole, 182 S.C. 206, 188 S.E. 860 (1936); Snorek v. Boyle, 18 Wis. 2d 202, 118 N.W.2d 132 (1962).

4. Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); O'Neal v. Pocahontas Transp. Co., 99 W. Va. 456, 129 S.E. 478 (1925).

5. Harper Motor Lines, Inc., 218 Ga. 812, 130 S.E.2d 817 (1963); Graves v. Harrington, 177 Okla. 448, 60 P.2d 622 (1936).

6. Sterling v. Hartenstein, 185 Kan. 50, 341 P.2d 90 (1959); Andrews v. Poole, 182 S.C. 206, 188 S.E. 860 (1936).

7. Deeg v. Lumbermen's Mut. Cas. Co., 279 F.2d 491 (10th Cir. 1960) (under New Mexico law, liability insurer could be joined notwithstanding "no action" provision in the policy); Am. So. Ins. Co. v. Dime Serv., Inc., 275 Ala. 51, 151 So.2d 783 (1963) (where insurer had issued liability policy in conformity with Financial Responsibility Act for public protection and benefit, no provisions should limit liability thereunder); Stearns v. Graves, 61 Idaho 232, 99 P.2d 955 (1940) ("no action" clause given effect). *See generally* Note, 7 WIS. L. REV. 182 (1932).

8. McWhorter Transfer Co. v. Peek, 232 Ala. 143, 167 So. 291 (1936); Aplin v. Smith, 197 Iowa 388, 197 N.W. 316 (1924); Lopez v. Townsend, 37 N.M. 574, 25 P.2d 809 (1933); Keseleff v. Sunset Hwy. Motor Freight Co., 187 Wash. 642, 60 P.2d 720 (1936).

9. L.S.A.-REV. STAT. § 22:655 (1962); WIS. STAT. ANN. § 260.11(1) (1957), *as amended*, (Supp. 1968) reads as follows:

> (1) Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. A plaintiff may join as defendants persons against whom the right to relief is alleged to exist in the alternative, although recovery against one may be inconsistent with recovery against the other; and in all such actions the recovery of costs by any of the parties to the

insurance company to be joined as a party defendant in an action for damages against the insured, or to be named as defendant in a direct action by the injured party.[10]

The only law on point in Florida at the time of the decision in the *Bussey* case was the 1936 decision by the Supreme Court of Florida in *Artille v. Davidson,* which held that the liability insurer could not be joined as a party defendant under a policy whereby the insurer agreed to settle or defend against claims resulting from liability imposed by law upon the insured, where the action against the insured sounded in tort and the action against the insurer sounded in contract.[11] The court in *Bussey* reached its result by distinguishing the *Davidson* case and by viewing the question of joinder in the light of the persuasive authorities and reasoning provided by the appellant in his brief.[12] Emphasis is placed on the importance of taking this new look at the question of joinder because of events happening subsequent to the *Davidson* decision, " and subsequent legislative enactments and apparent changes in public policy."[13]

The most important events in Florida law for the purpose of this decision are admissions—in briefs filed on behalf of insurance companies[14]—that are tantamount to establishing insurance companies as the real party in interest in cases involving their respective insureds.[15] How is this important? Subsection (a) of Rule 1.210, Florida Rules of Civil Procedure reads as follows:

> (a) Parties Generally. Every action may be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom

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action shall be in the discretion of the court. In any action for damages caused by negligent operation, management, control, maintenance, use or defective construction of a motor vehicle, any *insurer* of motor vehicles, which has an *interest* in the outcome of such controversy *adverse to the plaintiff or any of the parties to such controversy, or* which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to such action, or *agrees to engage counsel to prosecute or defend said action,* or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured . . . . (Emphasis added.).

10. An example of a statute expressly prohibiting such joinder is R.I. GEN. LAWS § 27-7-2 (1956).

11. 126 Fla. 219, 170 So. 707 (1936).

12. Although they are not expressly delineated as such in the text of the decision, all three grounds provided by the appellant for distinguishing the *Davidson* case were apparently adopted by the court. Brief for Appellant at 18, 19, Bussey v. Shingleton, 211 So.2d 593 (Fla. 1st Dist. 1968).

13. Bussey v. Shingleton, 211 So.2d 593, 594 (Fla. 1st Dist. 1968).

14. These briefs were filed in a 1966 Florida Supreme Court case, styled "In Re: Proposed Addition to the Additional Rules Governing the Conduct of Attorneys in Florida." In this case, the insurance associations representing 659 insurance companies, of which the defendant in *Bussey* is a member, successfully opposed the adoption of an addition to the canons of professional ethics which would have prohibited the insurance companies from employing salaried counsel to defend suits against their insureds.

15. The insurance company has a direct financial interest in the litigation.

"The insurance company and the insured have an identity and community of interest in the defense of any suit brought against the insured." Brief of Liberty Mut. Ins. Co. at 5, 7 (No. 35,524, Fla. S. Ct., Nov. 24, 1966).

> or in whose name a contract has been made for the benefit of another or a party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and *any person may be made a defendant who has or claims an interest adverse to the plaintiff.* Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. *Persons having a united interest may be joined on the same side as plaintiffs or defendants, and when any one refuses to join, he may for such reason be made a defendant.* (Emphasis added.)

Thus, if it can be established that the insurance company is the real party in interest,[16] this procedural rule can be construed as allowing an insurance company properly to be joined as a party defendant, since no statutory law prohibits such joinder.

A major obstacle to allowing joinder of the insurance company in Florida and in other jurisdictions has been the claim that inclusion of the insurance factor into the case is prejudicial to the plaintiff in that it may increase his amount of recovery.[17] The court in *Bussey* pointed out, however, that in the Wisconsin cases operating under a statute[18] which expressly allows direct action against the insurance company, jury verdicts tended to be lower where the insurance company was made a party.[19] The court further commented that the prejudice theory is no longer applicable since "juries know there is a strong probability of insurance and an able plaintiff's attorney has many legitimate ways of indirectly getting across to a jury that there is insurance."[20]

It is the court's conclusion that if the insurance company may admit to being an interested party for the purpose of allowing its attorneys ethically to defend its insured in an action against him based on negli-

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16. *See* Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws*, 1965 WIS. L. REV. 268, where, at page 277, the author states:

> *Realistically, it is the insurance company which is the true party in interest in the typical personal injury suit.* The insurer must pay, within policy limits, any damages adjudged against the insured and the insurer hires the defense attorney and in general conducts the negotiations and litigation with the injured plaintiff. The states which enacted direct action statutes recognize this *fact of life.* (Emphasis added.).

17. This is perhaps why evidentiary rules still arbitrarily prohibit mentioning insurance.

18. WIS. STAT. ANN. § 260.11 (1) (1957), *as amended*, (Supp. 1968).

19. Bussey v. Shingleton, 211 So.2d 593, 595 (Fla. 1st Dist. 1968). 8 *Appleman Ins. L. & P.* § 4861, n.18 (1962) supports the court's statement as follows:

> Since Volume 8 was first written, extensive studies have demonstrated that the injection of insurance tends to diminish the size of jury verdicts; and states like Wisconsin which have permitted direct joinder have lower verdicts than neighboring states not permitting mention of the insurer's presence. . . .

20. Bussey v. Shingleton, 211 So.2d 593, 596 (Fla. 1st Dist. 1968). For a discussion of some of the procedural difficulties that arise where the prejudice theory is followed, see Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157, 159 (1955).

gence,[21] it should not be allowed to object to the propriety of being joined in such an action.[22] As a practical consideration, the court took judicial cognizance of the fact that insurance companies can afford to employ the best attorneys available, while often the injured party is financially compelled "to accept lesser able counsel or agree to larger contingent fees . . . ."[23] The court maintains that such furnishing of costs of defense and control of litigation gives the insurance company such an interest adverse to the plaintiff that the insurance company should be "brought out into the open" as an interested party.[24]

Unless the Florida Legislature decides expressly to prohibit the right of joinder of an insurer as a party defendant under a liability insurance policy, and pending a final decision by the Supreme Court of Florida, the decision in the instant case indicates a trend toward furthering the goals of the liberal code pleading system. With the general tendency of code pleading to be increasingly liberal in permitting joinder, the writer believes this decision to be potentially far reaching, yet soundly based on the common knowledge that insurance is a "fact of life," and on the newly acquired admissions by the insurance companies themselves as to their direct interest in litigation.

It would have been easy for the court to take refuge behind the conservative barrier built upon a foundation of phrases like "such things are wholly within the province of the legislature." Instead, the court faced the issue squarely and construed the procedural rule in question as it deemed proper and sensible. Eventually the legislature should and probably will articulate its desires on this matter. Until then, it is well within the province of the courts to deal with the problem and, at the same time, to alert and inform the legislature as to the various considerations involved.

JONATHAN P. ROSE

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21. It is interesting to note that the same attorneys defending the insurance company in the *Bussey* case said the following when the addition to the rules governing the conduct of attorneys in Florida was being considered:

> The proposed Rule can be advocated only if one accepts its implicit basis: that the employment of a salaried lawyer in the situations delineated constitutes the unauthorized practice of law by the employing lay agency. This is a patently invalid premise which ignores the fact that *the insurance company is primarily and basically defending its own interests when it employs an attorney to defend its insured.* Amicus Curiae Brief of American Insurance Association, American Mutual Insurance Alliance and National Association of Independent Insurers at 2 (No. 35,524 Fla. S. Ct., Nov. 24, 1966) (emphasis added).

22. Bussey v. Shingleton, 211 So.2d 593, 596 (Fla. 1st Dist. 1968).

23. *Id.*

24. *Id.*